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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 466

WEST TEXAS UTILITIES COMPANY, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY MEMORANDUM FOR PETITIONER, WEST TEXAS UTILITIES COMPANY, INC.

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In its Memorandum of response to the petition for a writ of certiorari, the National Labor Relations Board, herein called "the Board", concedes that the petition presents one issue of general importance in the administration of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Secs. 151, et seq.), herein called "the Act", but suggests, nevertheless, that "this Court retain the present petition on [its] docket pending disposition of No. 425" (Memo., p. 13). In support of this suggestion the Board urges (1) that this case, unlike No. 425,

presents issues of statutory policy which should in the first instance be decided by the Board, and (2) that there are no other issues presented which warrant further review by this Court. Neither of these propositions is sound and both are based upon erroneous factual assumptions.

I

The first proposition urged by the Board in support of its suggestion for deferring action on this petition is that the Board has not yet "decided whether an employer violates the Act by refusing to bargain where, as here, the refusal is expressly based upon the contemporaneous noncompliance with Section 9(h) of a union which has later complied", nor "whether, if such a refusal violates the Act, the Board would deem a bargaining order appropriate to 'effectuate the policies of this Act' " (Memo., p. 8). Since these are questions of statutory policy, the Board suggests this case should be remanded to the Board for decision of these questions if it affirms the decision of the Court of Appeals for the Fourth Circuit in *N.L.R.B.* v. *Highland Park Mfg. Co.*, No. 425, or dismissed if it reverses in No. 425.

This suggestion is without merit because it rests upon two erroneous factual assumptions. First, it assumes that the AFL came into compliance with Sec. 9(h) of the Act between September 19, 1947—the date of petitioner's admitted refusal to bargain with the Union—and June 24, 1948—the date upon which the complaint was issued, but the record in this case contains no evidence that such compliance was effected by the AFL during this period. The matter was never litigated because the Union and the Board at all times until the case reached the Court of Appeals contended only that the AFL is not required to comply with Sec. 9(h) at all. Only in the Court of Appeals did the Union, but not the Board, advance for the first time the contention that the AFL came into compliance after September 19, 1947 and was for that reason entitled to utilize the facilities of the Board. Moreover, if this Court is now

to go outside this record to determine the fact, petitioner will show that the affidavits alleged to have been filed by Messrs. Green and Meany on November 7, 1947, did not constitute compliance with the requirements of Sec. 9(h) and that they were the result of a scheme to circumvent the requirements of Sec. 9(h) whereby the AFL convention, without changing the duties of its officers, stripped from its Executive Council members their titles as Vice Presidents of the AFL. This action was frankly taken only because one of the Vice Presidents, John L. Lewis, refused to sign the Section 9(h) affidavit, thus preventing the AFL from effecting compliance.[1] We do not suggest that this Court

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[1] The "Report of the Proceedings of the Sixty-Sixth Convention of the American Federation of Labor held at San Francisco, California, October 6 to 16, inclusive 1947" published by direction of the American Federation of Labor, records the following:

"SUPPLEMENTAL REPORT OF THE EXECUTIVE COUNCIL

(Vice-Presidents)

"In order that affiliated federal labor unions of the American Federation of Labor may fully exercise their right to qualify or not to qualify under the Taft-Hartley Act without in any way interfering with the right of any individual officer of a national or international union to follow the policy of his own organization in this regard, the Council recommends the following changes in the Constitution of the American Federation of Labor:

"Section 1 of Article V, which now reads:

" 'The officers of the Federation shall consist of a President, 13 Vice Presidents, and a Secretary-Treasurer, to be elected by the convention on the last day of the session, unless otherwise determined by the convention, and these officers shall be the Executive Council.'

shall be changed to read as follows:

" 'The officers of the Federation shall consist of a President and a Secretary-Treasurer, to be elected by the convention on the last day of the session, unless otherwise determined by the convention.' "

* * *

"A new Section 1 shall be inserted at the beginning of Article IX to read as follows:

" 'There shall be constituted an Executive Council consisting of thirteen (13) members who shall be elected by the convention on the last day of the session unless otherwise determined by the con-

should now go outside the record to determine these unlitigated questions. Rather we urge that since the matter was never litigated, the Court of Appeals erred in undertaking to decide the question when raised for the first time there by the intervenor Union.

The Board's second erroneous assumption of fact is that the Board has not decided the so-called question of statu-

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vention. These thirteen (13) members of the Executive Council shall be designated and elected as the First Executive Council Member, the Second Executive Council Member and so forth.'"

* * *

"As stated in the report, the purpose of this proposed change in the constitution is to increase the freedom of decision of federal local unions with reference to their actions and policies concerning requirements of the Taft-Hartley Law. If adopted this Constitutional revision would establish the President and Secretary-Treasurer of the American Federation of Labor as the only 'officers' of the Federation within the meaning of the Taft-Hartley Law. Such action would not, however, curtail or limit the responsibility and authority of the Executive Council.

"Your committee considered this matter most thoroughly. We recognize the untenable position in which the federal local unions are placed under existing circumstances and, therefore, recommend, with one vote, representing the United Mine Workers, dissenting, the adoption of this Constitutional revision." (Report of Proceedings, pp. 482, 483.

The amendment was adopted by the vote of the full convention. Report of Proceedings, p. 505). In discussing the proposed amendment several of the delegates made it perfectly clear that the proposed amendment was nothing more than a subterfuge. For example, John L. Lewis, President, United Mine Workers of America, delegate and AFL Vice President, stated:

"Your Committee comes in here with a Constitutional amendment which, of course, I am trying to oppose—just for the record—that puts in the printed word of the Constitution the claim that the American Federation of Labor will only have two officers. Well, that is not true. The Federation will continue to have 15 officers, 13 members of some kind of an Executive Council and a President and Secretary, which makes 15—although your Constitution will say that you only have two officers. Of course, the Council is going to have some duty, and if they are not officers of the Federation what will they be?

"You know, to me that smacks of the Communist technique, to lie to escape responsibility. That is what that does; that's a lie." (Report of Proceedings, p. 491)

* * *

". . . It is a matter of principle as to whether or not I should accept a position on a denatured governing body of this organization that will live a continuous lie as long as in the service, because that

tory policy. Actually, both of the Board's two decisions on the question resolve this question in accord with petitioner's position that in the circumstances of this case, it had no obligation to bargain with the union on September 19, 1947. In *Matter of Andrews Company*, 87 NLRB 379, the Board so held. In that case, a majority of the Board held that no obligation rests on an employer to bargain with a non-

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Board, whatever you call it, will be the officers of the American Federation of Labor, and it simply is not true that the American Federation of Labor will only have two officers." (Report of Proceedings, p. 492)

Daniel J. Tobin, President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, delegate and AFL Vice President, stated:

"As a matter of fact, the question isn't of much importance. The changing of my title, or whoever will succeed me, from that of Vice President to Executive Council member means just exactly the same thing—no difference. We have the same powers and we will function just as before." (Report of Proceedings, p. 493)

* * *

"Let me say to you the only reason this amendment is before you is because we could not get unanimous action within the Council.

* * *

". . . My judgment is that it is the duty of this convention to amend that constitution, because in substance the amendment does not mean anything, while it does mean something to a quarter of a million members who are dependent upon us to help them." (Report of Proceedings, p. 494)

Delegate Cudahy (Federal Labor Union 22631) stated:

"The question is on the supplemental report of the Executive Council to eliminate the titles or positions of vice-presidents, in order to enable 280,000 federal labor union members to avail themselves of the facilities of the National Labor Relations Board. That is a commendable action, I think. However, I want to pose this question. We are talking about a law passed by a reactionary Congress being administered by the illustrious Mr. Denham and the National Labor Relations Board. We propose here to engage in what I think is the most childish kind of subterfuge. I don't suppose Mr. Denham was selected to administer this Act because he graduated from grade school day before yesterday or something like that. I think Mr. Denham can see through subterfuge as well as any legal adviser that the Government might instruct to administer this Act, and on behalf of the Union I represent I would like to pose this question: if the convention adopts the report of the committee, is it a foregone conclusion that those federal labor unions will enjoy the facilities of the Board, or is there still remaining some question as to what the ruling of the Board might be under changed circumstances?" (Report of Proceedings, p. 499)